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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

A.P.,

Petitioner,

v.

THE SUPERIOR COURT OF
STANISLAUS COUNTY,

Respondent;

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Real Party in Interest.

F058827

(Super. Ct. No. 515560)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Nancy B. Williamsen, Judge.

Parent Advocates of Stanislaus and Maria Elena Ramos for Petitioner.

No appearance for Respondent.

John P. Doering, County Counsel, and Linda S. Macy, Deputy County Counsel, for Real Party in Interest.

*Before Vartabedian, Acting P.J., Levy, J., and Gomes, J.

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Petitioner seeks an extraordinary writ (Cal. Rules of Court, rule 8.452) from respondent court's findings and orders issued at a contested jurisdictional/dispositional hearing adjudging her infant daughter, K., a dependent child and denying petitioner reunification services and setting a Welfare and Institutions Code section 366.26¹ hearing. She contends the juvenile court violated her Fifth Amendment right against self-incrimination. We will deny the petition.

STATEMENT OF THE CASE AND FACTS

Dependency proceedings were initiated in July 2009 when the Stanislaus County Community Services Agency (agency) received a referral that petitioner had just given birth to K. and that petitioner's first child, a son, A., died in December 2008 at 17 months of age under suspicious circumstances, and petitioner's husband, the father of petitioner's children, was incarcerated.² Petitioner told hospital staff A. died of Sudden Infant Death Syndrome but also stated she did not know how A. died.

According to the coroner's report of A.'s death, A. died of blunt force injuries to the abdomen and head. The contributing factor of his death was chronic child abuse. The manner of death was ruled a homicide.

During interviews with law enforcement in December 2008, petitioner said she saw the father pick A. up by his arms and throw him against the wall, grab him by the legs and hit A.'s head on the carpeted ground. Father admitted grabbing A. by the legs and hitting his head on the ground but claimed it only occurred once or twice, and A.'s head was not hit hard. Petitioner and father were arrested and charged as co-conspirators in A.'s death. Father was charged with assault resulting in the death of a child under 8

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² The father did not file a writ petition.

(Pen. Code, § 273ab) and murder (Pen. Code, § 187). Petitioner was charged with willful cruelty to a child with possible injury or death (Pen. Code, § 273a, subd. (a).) At the time of K.'s birth, petitioner was on bail pending the pre-trial hearing scheduled for February 2010.

The agency took K. into protective custody at the hospital and filed a dependency petition on her behalf pursuant to section 300, subdivisions (b) (failure to protect), (e) (severe physical abuse), (f) (death of a child through abuse or neglect) and (g) (no provision for support). K. was placed in a foster/adoptive home.

The juvenile court ordered K. detained pursuant to the petition and set the jurisdictional/dispositional hearing for August 2009. In its report for the hearing, the agency recommended the court sustain the petition and deny petitioner reunification services pursuant to section 361.5, subdivision (b)(4) and (6).³ The agency also recommended the court deny father reunification services.

The agency also provided further details in its report of petitioner's knowledge the father was abusing A. During an interview several days after A.'s death, a detective told petitioner A. had old injuries including four broken ribs and a broken femur. Petitioner told the detective she was present in mid-November when the father slapped A. on the stomach "really hard" because A. was crying and the father does not like crying. When

3 Section 361.5, subdivision (b)(4) and (6) provides in relevant part:

"(b) Reunification services need not be provided to a parent ... described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] ... [¶] (4) That the parent ... of the child has caused the death of another child through abuse or neglect. [¶] ... [¶] (6) That the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of ... the infliction of severe physical harm to the child, a sibling, or a half sibling by a parent ... and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent"

A. began to cry louder, petitioner saw the father pick A. up by the arms and throw him hard against the wall. He then grabbed A. by the legs and hit A.'s head on the carpeted ground. At this point, petitioner intervened. She sensed that A. was hurt "everywhere" and placed him in his crib. She did not intervene sooner because she was afraid for herself.

The agency also reported that, during his interview in December 2008, father told the detective he hit A. three weeks prior, which probably caused the broken ribs, and in October 2008 he hit A. in the stomach until the baby stopped crying.

Petitioner challenged the agency's recommendations and, after several continuances, the juvenile court convened a two-day contested jurisdictional/dispositional hearing in October 2009. On the first day of the hearing, the juvenile court struck the section 300 subdivision (e) allegations and modified the petition to allege them under subdivision (a) of section 300 (serious physical harm).

Petitioner's counselor testified she was assigned to counsel petitioner in the areas of parenting, grief and loss and domestic violence. Petitioner was attending a parenting class and was being assessed for counseling as a victim of domestic violence. However, petitioner declined grief and loss counseling, claiming she had already gone through that process after losing A. The counselor also testified petitioner wanted "very much" to remain a couple with father and did not accept that he was responsible for A.'s death. She told the counselor A. fell often.

On the second day of the hearing, petitioner's attorney advised the court that county counsel planned to call petitioner to testify and asked to be heard on the issue of petitioner's right under the Fifth Amendment to refuse to testify. To that end, petitioner's attorney asked the court to consider the ruling in *In re Mark A*,⁴ wherein, she argued, the

⁴ *In re Mark A.* (2007) 156 Cal.App.4th 1124.

appellate court found that section 355.1, subdivision (f)⁵ (section 355.1(f)) does not provide the requisite immunity as a matter of law as that provided under the Fifth Amendment. Also, petitioner's attorney asked that petitioner's criminal attorney be notified and allowed to be present if the court directed her to testify. Father's attorney asked the court to also consider California Rules of Court, rule 5.548,⁶ which she said "discusses the granting of immunity to witnesses who are claiming a privilege against self-incrimination." Father's attorney also argued recent case law suggests that section 355.1(f) is not absolute and if the court were to order someone to testify, immunity should be offered and the District Attorney notified.

County counsel advised the court section 355.1(f) prevents a witness's testimony in dependency proceedings from being used against that witness in criminal proceedings but also told the court she did not intend to ask questions that would bear on petitioner's pending criminal matter. Further, county counsel argued *In re Mark A.* does not disallow a parent's testimony and proposed the court order petitioner to take the stand and address any questions that related to her criminal matter as they arose.

Father's counsel concurred that petitioner's criminal attorney should advise petitioner of the consequences of testifying since petitioner and father's criminal cases were connected and because petitioner's testimony could expose her to criminal culpability. Minor's counsel argued petitioner and father's relationship was relevant to

⁵ Section 355.1, subdivision (f) provides: "Testimony by a parent ... who has the care or custody of the minor made the subject of a proceeding under Section 300 shall not be admissible as evidence in any other action or proceeding."

⁶ California Rules of Court, rule 5.548(a) provides: "If a person is called as a witness and it appears to the court that the testimony or other evidence being sought may tend to incriminate the witness, the court must advise the witness of the privilege against self-incrimination and of the possible consequences of testifying. The court must also inform the witness of the right to representation by counsel and, if indigent, of the right to have counsel appointed."

the court's decision whether to order reunification services and she wanted petitioner to testify as to the nature of their relationship.

The court stated petitioner was represented by counsel and free to assert her Fifth Amendment privilege as to specific questions if so advised by her attorney. The court agreed with county counsel that section 355.1(f) was enacted to allow the court to get to the heart of the matter and not allow the parent to shield information that is relevant and thwart the agency's ability to prove their case. The court ruled that the agency could proceed with its case-in-chief and petitioner could assert her Fifth Amendment privilege to specific questions at which time the court would consider the assertion.

Petitioner was called to testify by county counsel. She confirmed she was married to father for nearly five years and that A. died in early December 2008. She testified she did not need further grief and loss counseling because friends and family helped her deal with her grief. Although it had been only 11 months since A.'s death, she had recovered emotionally from it. She planned to stay married to father and hoped to be able to parent K. with him. She believed K. would be safe in their custody.

County counsel then elicited the statement petitioner contends was self-incriminating. County counsel asked: "Do you blame your husband for [A.'s] death?" to which petitioner responded, "No, I do not." Her attorney objected on Fifth Amendment grounds and moved the court to strike the answer. The court stated it did not believe it ruled on the objection but thought it was something that was instructed. The court stated it would have an opportunity to look into it further during the lunch break. County counsel concluded her examination of petitioner and the court did not rule on petitioner's attorney's objection.

The final witness was petitioner's caseworker who testified petitioner remained steadfast in her belief that father would be exonerated and they would parent K. together. The caseworker did not believe K. would be safe in petitioner's custody or that providing petitioner reunification services would serve K.'s best interests.

At the conclusion of the hearing, the juvenile court sustained the petition, ordered K. removed from petitioner and father's custody, and denied them both reunification services as recommended by the agency. The court also set a section 366.26 hearing from which this petition ensued.

DISCUSSION

Petitioner contends the juvenile court violated her Fifth Amendment right against self-incrimination by compelling her to testify, by not ruling on her attorney's objection to her statement she did not blame father for A.'s death and by considering her statement in making its rulings. Consequently, she argues, its jurisdictional finding and dispositional orders must be vacated and the matter remanded for a new hearing. We disagree.

Assuming without deciding that petitioner's attorney's objection constitutes an invocation of her Fifth Amendment right not to incriminate herself and that the juvenile court erred in not striking her statement, we conclude the error was harmless beyond a reasonable doubt. (*In re Mark A.* (2007) 156 Cal.App.4th 1124, 1144, citing *Chapman v. State of California* (1967) 386 U.S. 18, 24.) First, the juvenile court read and considered, without objection, the agency's jurisdictional/dispositional report and the sheriff's December 2008 investigative report wherein petitioner admitted observing father abuse A. without intervening. Secondly, the court heard testimony by petitioner's therapist that petitioner did not accept that father was responsible for A.'s death. Consequently, there was more than enough evidence before the court for it to adjudge K. a dependent of the court and deny petitioner reunification services without her statement.

Further, there is no evidence on the record that the juvenile court even considered petitioner's statement in deciding her case. The court made no reference to her testimony. Rather, the court appears to have relied heavily on the counselor's testimony, especially her testimony that petitioner wanted to maintain her relationship with father, did not accept that he caused A.'s death and had worked through her grief and loss of A.

Finally, even if the juvenile court had considered petitioner's statement, it would have only affirmed evidence contained in the reports and adduced through testimony. For all the reasons stated above, we conclude any error was harmless beyond a reasonable doubt.

DISPOSITION

The petition for extraordinary writ is denied. This opinion is final forthwith as to this court